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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 760

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL No. 12, AFL,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

The petitioner herein respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, enforcing, as modified, the Board's order. The said court, on the 4th day of December, 1956, entered its order denying respondent's petition for rehearing and filed and entered the decree enforcing, as modified, said order of the National Labor Relations Board on December 10, 1956.

Jurisdiction.

The jurisdiction of this court is invoked under the provisions of 28 U. S. Code Section 2101, and pursuant to Rule 22 of the Rules of the Supreme Court of the United States, effective July 1, 1954.

Citations to Opinions Below.

The findings, opinion and decision of the National Labor Relations Board is set forth in the transcript of record at pages 25 to 49, inclusive.

The Opinion of the Court of Appeals is not yet reported but is printed in Appendix "A" and its Decree in Appendix "B."

Statutes Involved.

The statute involved is Section 8(b)(1)(A) and Section 8(b)(2) of the National Labor Relations Act, as amended, set forth in Appendix "C" attached hereto.

Statement of the Case.

I. The Board's Findings of Fact and Conclusions of Law.

Local 12 together with other construction trade unions has a collective bargaining agreement with Associated General Contractors, herein called AGC [R. 29, 51]. Under this agreement Local 12 is authorized to dispatch certain classifications of workmen for employment with the building and construction contractors who comprise the membership of AGC [R. 30-31, 56, 151-153]. The legality of the agreement as such is not in issue. The Board found, however [R. 39-40], that Local 12 discriminatorily operated the dispatch system in violation of Section 8(b)(1)-(A) and (2) of the Act by giving preference in job referrals to Local 12 members, by requiring non-union appli-

cants for jobs to apply for membership in Local 12 immediately upon their first job referral, and by imposing a weekly permit fee on non-union members when working in its jurisdiction with the AGC unit. The Board found an additional violation of the cited statutory provisions in Local 12's removal of Holderby's name from the preferred list of employee applicants because of his expulsion from Local 12 [R. 40].

A. *The Dispatch System Set Forth in the Agreement.*

At all times relevant the collective bargaining agreement between Local 12 and its sister unions on the one hand and AGC on the other contained in Article II-A an exclusive recognition clause, a recital of the employers' freedom to hire and discharge employees subject to the conditions imposed by the agreement, and a union-security clause requiring employees of AGC members covered by the agreement to become members of the appropriate local union not more than thirty days after being employed [R. 29-30, 150-151]. Following these provisions, Article II-B sets up a dispatch system in the following terms [R. 30-31, 151-152]:

> B. That in the employment of workmen for all work covered by this Agreement in the territory above-described the following provisions, subject to the conditions of Article II-A, above shall govern:
>
> 1. That the Local Unions shall establish and maintain open and nondiscriminatory employment lists for employment of workmen in the work and area jurisdiction of each respective Local Union of each particular trade.
>
> That the Contractors shall first call upon the respective Local Unions having work and area juris-

diction, or their Agents, for such men as they may from time to time need, and the respective Local Unions, or their Agents, shall immediately furnish to the Contractors the required number of qualified and competent workmen and skilled mechanics of the classifications needed by the Contractors.

That the respective Local Unions, or their Agents, will furnish each such required competent workman or skilled mechanic entered on their lists, to the Contractors by use of a written referral and will furnish such workmen or skilled mechanics from the respective Local Unions' listing in the following manner:

(a) Workmen who have recently been laid off or terminated in that respective Local Union's work and area jurisdiction by the Contractors desiring to reemploy the same workmen in the same area provided they are available for employment.

(b) Workmen who have been employed by Contractors in the respective Local Union's work and area jurisdiction within the multiple-employer unit during the previous ten (10) years, and are available for employment.

(c) Workmen whose names are entered on the list of the respective Local Union having work and area jurisdiction and who are available for employment.[1]

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[1]Article 11-B further provides that if the Local Unions do not within 48 hours after appropriate notice from the Contractors furnish the required workmen, the Contractors are entitled to obtain such workmen from other sources but are to report the names of such workmen to the Local Union having work and area jurisdiction.

II. The Court of Appeals' Modification of the Board Order.

In modifying the order of the Board, the Court found there was no support for the Board's findings of unfair labor practices alleged to have been committed by the Respondent Union with the exception of acts of discrimination against Holderby, the named employee. The Court held the order of the Board too broad and that it be modified so as to require only that Holderby be made whole because of the alleged discrimination, and eliminated any order with respect to the alleged discriminatory hiring hall practices.

The opinions of both the Board and the Court of Appeals make it clear that both tribunals analyzed the Holderby matter as a violation of Section 8(b)(2) of the Act.

Section 8(b)(2) of the Act provides that it is an unfair labor practice for a labor organization

> "To cause or attempt to cause an employer to discriminate against an employee in violation of Subsection (a)(3). . . ."

The record in this case contains no evidence whatsoever that any employer took any action or was induced or requested by the respondent union to take any action to the detriment of Holderby.

Inasmuch as General Counsel for the Board does not contend that there was any evidence linking any particular employer, the question is raised whether Section 8(b)(2) prohibits mere refusal to dispatch a man from a hiring hall where there is no showing that the Union attempted to or did in fact induce any employer to discriminate.

Question Presented.

(1) Is refusal to dispatch an employee from a hiring hall an unfair labor practice where there is no evidence that the Union caused or attempted to cause discrimination "by an employer"?

Reasons for Granting Certiorari.

The petitioner herein respectfully urges the following reasons why *certiorari* should be granted:

A. The Court of Appeals in this case has rendered a decision finding an unfair labor practice which does not exist under the Act. It has, under the guise of interpretation, imported into the Statute conditions or criteria which the Congress omitted.

B. The question involved is of general national importance in that the decision of the Court of Appeals seeks to accomplish that which can be brought about only by an amendment to the Act, which resides with Congress.

A. The Court of Appeals Has Rendered a Decision in Conflict With the Provisions of the National Labor Relations Act, as Amended.

The fundamental issue involved in this matter is whether or not the mere refusal to dispatch a man to work by a union is an unfair labor practice under the Act, where there is no evidence that employment with a specific employer is available, and where there is no evidence that the union caused or attempted to cause a specific employer to discriminate. The action is based on mere refusal to dispatch from the hiring hall but without any showing that any employer was asked or required to discriminate.

In the proceedings before the National Labor Relations Board, the dissenting member of the Board took the posi-

tion that the Act does not make unlawful, refusal to dispatch an employee by a union, where there is no evidence that the union caused or attempted to cause discrimination by an employer. The dissenting member of the Board said [R. 45-47]:

> ". . . Employers alone under Section 8(a)(3) are forbidden to discriminate against their employees to encourage or discourage union membership. Unions, on the other hand, are forbidden under Section 8(b) to (2) to 'cause or attempt to cause' such discrimination *by an Employer*. It is therefore completely outside the applicable proscription of this Section of the Act to find, as the majority does, that the Respondent Union discriminated 'against non-members of Local 12.' The fact that the Respondent Union may have referred one employee rather than another to prospective employers is not sufficient, in my opinion, to prove that the Union *caused* a particular employer to engage in an act of discrimination. ***Indeed, the record in this case contains not the slightest evidence that any employer took any action or was induced or requested by the Union to take any action to the detriment of any employee.*** . . . (Emphasis added.)
>
> "The General Counsel does not contest the legality of the agreement between the Union and the contractors' Association whereby the Union agreed to refer applicants for employment to members of the Association. If, however, this contract is legal there is no act by any employer in this case which is even remotely related to discrimination against any employee. But the majority finds, nevertheless, that the Union caused the members of the Association to engage in acts of discrimination against employees and prospective employees. I am unable to determine from a reading of the majority's decision the basis of their conclusion that the referral practice of the Union,

unauthorized under the terms of its contract with the Association constituted discrimination by members of the Association against employee applicants generally and Holderby in particular. If the majority is holding implicitly that the Union was acting as an agent of the Association in discriminating among applicants in violation of Section 8(a)(3), there is, in my opinion, no warrant for such a finding in this case. The only authorization extended to the Union by the Association was to refer applicants for employment in accordance with the terms of the contract which, as indicated above, is not alleged to be an unlawful agreement. Certainly, there is nothing in the common law rules of agency making members of the Association liable, as principals, for unauthorized acts of the Union, particularly where, as here, those acts are found to be in violation of a federal statute."

"I believe the majority has misread the language of Section 8(b)(2). The Statute clearly establishes that discrimination by an employer is a prerequisite to a finding of unlawful causation under Section 8(b)(2). In the instant case the majority's decision, in effect, converts discrimination by a Union into discrimination by an employer. In my opinion, this goes beyond the literal language of Section 8(b)(2) and the intent of Congress in its enactment.

"For these reasons I dissent."

In the Court of Appeals MR. JUSTICE HASTIE agreed with the dissenting member of the Board. In his dissenting opinion, MR. JUSTICE HASTIE said:

"I think the union's action with reference to Holderby did not constitute a violation of clause (2) of Section 8(b). The issue under that clause is whether the union caused or attempted to cause any employer to discriminate against Holderby in violation of the

Act. In resolving that issue it must be determined whether the union caused or attempted to cause an employer to engage in conduct which, if committed would violate Section 8(a)(3).

> "'That subsection makes it an unfair labor practice for an employer "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . "' (29 U. S. C. Sec. 158(a)(3).)

"(Radio Officers' Union v. National Labor Relations Board, 1954, 347 U. S. 17, 53).

"In this case no employer was told or even given reason to believe that Holderby or anyone else was being treated improperly in the matter of job referral. No one brought to any employer's attention any charge that the union was abusing the lawful referral arrangement to which various employers had subscribed. At most the union was accomplishing an effective discrimination against Holderby without causing or attempting to cause any employer to act improperly in any way.

"In this all important respect the present case differs from the numerous adjudicated cases in which the board and the courts have found violations of Section 8(b)(2). Those cases characteristically reveal either aggressive wrongdoing by the employer himself or his acquiescence and cooperation in making misconduct on the part of the union injurious to some employee.

> "'See e.g. National Labor Relations Board v. Local 803, International Brotherhood of Boilermakers, AFL, 3d Cir. 1955, 218 F. 2d 299 (On union demand the employer fired and refused to hire men not in good standing in the union); National Labor Relations Board v. International

Union of Operating Engineers Local 101, AFL, 8th Cir. 1954, 216 F. 2d 161 (Employees discharged in accordance with union seniority rules though employer's rules provided otherwise); National Labor Relations Board v. Philadelphia Iron Works, 3d Cir. 1954, 211 F. 2d 937 (Union caused employer to withdraw job offer); National Labor Relations Board v. George Auchter Co., 5th Cir. 1954, 209 F. 2d 273 (Employer refused to employ applicant because of union's refusal to issue referral); National Labor Relations Board v. Bell Aircraft Corp., 2d Cir. 1953, 206 F. 2d 235 (Employee denied promotion because union charges pending against him.)'

"National Labor Relations Board v. International Longshoremen's and Warehousemen's Union, 9th Cir. 1954, 210 F. 2d 581, deserves special mention because it is a very recent decision of this court. But there too the employer was chargeable with knowledge of and responsibility for the misconduct of certain wrongdoing dispatchers, because those dispatchers were employees of the employer as well as the union and were subject to removal by an employer-union committee."

"In the present case the board has made a passing, but in my view unsuccessful, effort to charge employer complicity in or responsibility for the union's alleged wrongdoing. In a footnote the board refers to the employer's duty 'to insist that the union fulfill its contractual obligation of maintaining nondiscriminatory hiring lists.' I think it would be unfair and irrational to impose such a duty unless and until the employer is at least put on notice that the union is improperly discriminating against someone in the making of referrals. And, I know of nothing in the Act of its history that suggests legislative intention to

burden the employer with ferreting out union misconduct on penalty of being charged with complicity in that which he has not discovered.

"The foregoing analysis leads me to agree with the member of the board who dissented in this case that the record does not establish a violation of Section 8(b)(2)."

As the Honorable Abe Murdock said in his dissent in the proceedings before the Board:

". . . there is no act by any employer in the case which is even remotely related to discrimination against any employee. . . . In the instant case the majority's decision, in effect, converts discrimination by a union into discrimination by an employer. In my opinion, this goes beyond the literal language of Section 8(b)(2) and the intent of Congress in its enactment."

Judge Hastie, in his dissenting opinion in the Court of Appeals said:

"In this case no employer was told or even given reason to believe that Holderby or anyone else was being treated improperly in the matter of job referral. No one brought to any employer's attention any charge that the union was abusing the lawful referral arrangement to which various employers had subscribed. At most the union was accomplishing an effective discrimination against Holderby without causing or attempting to cause any employer to act improperly in any way.

"In this all important respect the present case differs from the numerous adjudicated cases in which the board and the courts have found violations of Section 8(b)(2)."

The Board itself has, in this instance, issued a decision conflicting with prior decisions.

The Board has heretofore held, that the General Counsel, in order to establish a labor organization's liability for a violation of Section 8(b)(2) in causing employer discrimination, "must prove that the labor organization 'caused' the employer to engage in conduct which—if the employer were before the Board—would be found violative of Section 8(a)(3)." *Newspaper and Mail Deliverers Union of New York and Vicinity*, 93 NLRB 419, 27 LRRM 1408. See also, *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America*, CIO, 92 NLRB 968, 27 LRRM 1188.

Conclusion.

For the foregoing reasons, we believe that the Court should grant a hearing to petitioner since the language of the Act does not make unlawful a refusal of the Union to dispatch a man from the hiring hall where there is no showing that any particular employer was asked to discriminate. This is true because there may be many reasons for refusal to dispatch, including inability to perform the work. Judge Hastie pointed this out in his dissenting opinion when he said:

> "We are not told upon what facts the Board relies or how it has arrived at the conclusion that a violation of this clause is established on the present record. This deficiency is a matter of concern because the record does not make it clear why Holderby was dropped from the Union or why his subsequent request for reinstatement was denied. It does appear that his controversy with the union has reached the stage of litigation in the state courts."

Respectfully submitted,

DAVID SOKOL,

Attorney for Petitioner.